13. Defendant Allen made the foregoing comments outside of judicial proceedings intentionally, maliciously and purposefully to retaliate against Mr. Mezibov for filing motions and raising legitimate defenses in his capacity as defense counsel in the . . . proceedings initiated and prosecuted by . . . Allen as Hamilton County Prosecutor . . . .

* * *

15. On October 21, 2001, Defendant Allen appeared in his capacity as Hamilton County Prosecutor on a local television talk show . . . . [I]n furtherance of his effort to defame, vilify and ridicule Mr. Mezibov by depicting Mr. Mezibov as an unethical, unprincipled and incompetent attorney, ***and to retaliate against Mr. Mezibov for his zealous defense of his client*** within the bounds of the law as he was ethically obligated to do, ***Defendant Allen publicly announced that he would go after Mr. Mezibov or any one like him who dared to question his ethics "with both barrels."*** During the course of the television program, Defendant Allen published the following statements:

> He [Mr. Mezibov] wanted to make it a show trial where he could ***attack me,*** he could attack Dr. Parrott, but frankly it blew up in his face and now his client, because of his [Mezibov's] conduct, faces two years in prison and the loss of his medical license. You know, in consumer law we have a saying let the buyer beware. I think in law, you ought to have a saying, let the client beware.
>
> *******

Had Dr. Tobias approached us early on about cooperating with the prosecution and working for us in a conviction of Mr. Condon, that's something that in all likelihood we would have entertained. But, his lawyer, Marc Mezibov, chose not to do that. And it makes you wonder, here's a man that now is going to lose his medical license, faces two years in jail, who may very well have been able to work with us and escape prosecution. It makes you wonder about the tactics of defense counsel and their intentions quite frankly.

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And when my ethics are questioned and when I'm called unethical, you're gonna get it back and you're gonna get it back with both barrels because I have to. I can't permit that to happen. Real defense lawyers, . . ., they try cases on the facts of the case. They try cases from the testimony that comes from the witness stand and the law that is given from the judge. I think Mr. Mezibov, what he wanted to do, he wanted his show trial. He wanted to be able to attack me, he wanted to be able to attack Dr. Parrott, and he wanted to be able to attack the Republican Party.

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. . . [H]ad this matter been handled in the normal fashion by a defense lawyer who was interested in his client's best interest rather than having a political show trial, Dr. Tobias

> very well could have fared a lot better than he did.
>
> 16. Defendant Allen made the foregoing comments outside of judicial proceedings intentionally, maliciously and with the ***purpose of retaliating against Mr. Mezibov for his constitutionally protected activity*** in filing motions and raising legitimate defenses before the Court . . . on behalf of Dr. Tobias, and for the purpose of causing harm to Mr. Mezibov's professional reputation.

(Emphasis added). (Complaint, ¶¶ 12, 13, 15 and 16).

The district court dismissed the complaint for failure to state a claim. On appeal, the Sixth Circuit affirmed, holding that, "in the context of the courtroom proceedings, an ***attorney retains no personal First Amendment rights*** when representing his client in those proceedings." (Emphasis added). *Mezibov v. Allen,* 411 F. 3d at 720-721.

Alternatively, the Court held that Mr. Mezibov failed to properly allege any adverse action sufficient to support a retaliation claim. The Court found that Mr. Mezibov was required to have a "thicker skin" than the average citizen because he had "voluntarily placed himself open to criticism of his actions" by agreeing to defend someone in a "high profile case." (Internal quotes and brackets omitted). *Id.* at 721. The Sixth Circuit concluded that, "[w]ith all that in mind, we are not persuaded that a criminal defense attorney of ordinary firmness would be deterred from vigorously defending his clients as a consequence of the alleged defamation in this case." *Id.* at 722. The Court of Appeals also held that Petitioner's allegation that he suffered damage to his professional reputation and emotional anguish and

distress was insufficient adverse action for purposes of a First Amendment retaliation claim. *Id.* at 721-722.

Petitioner filed his Complaint in the United States District Court on July 29, 2002. The District Court entered its Order granting Respondents' Motion to Dismiss Petitioner's First Amendment retaliation claim with prejudice on June 25, 2003.[1] The District Court entered its final judgment based on that Order on June 27, 2005.

Petitioner filed his timely Notice of Appeal on July 10, 2003. The Sixth Circuit's initial decision was entered on June 16, 2005. Petitioner filed his timely Petition for Rehearing with Suggestion for Rehearing *En Banc* on June 30, 2005. On September 29, 2005, the Sixth Circuit denied the Petition for Rehearing.

REASONS FOR GRANTING OF THE WRIT

A determination of whether an attorney representing a criminal defendant in a state court proceeding enjoys any First Amendment protection for ethically advocating on behalf of a client is a question of significant constitutional importance. Resolution of this issue will have profound constitutional implications for both the criminal defense attorney as well as the criminal defendant, who must rely on the independence of his counsel to protect the client's fundamental right to due process in criminal proceedings. The decision of the Sixth Circuit, removing attorneys from the umbrella of First Amendment safeguards with respect to court proceedings, subjects the criminal defense attorney to retaliation that now

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[1] At the same time the District Court entered a final Order dismissing without prejudice Plaintiff's state tort defamation claims.

escapes constitutional scrutiny in that Circuit. Petitioner, like all other criminal defense attorneys, must now balance his ethical obligation to his client with his concern about whether motions filed or arguments advanced in court proceedings will offend the sensibilities of the local prosecutor and result in retaliation.

To Petitioner's knowledge, no other court in the country has so completely denied attorneys the protection of the First Amendment when representing defendants in criminal court proceedings. As demonstrated below, other Circuits have expressly or implicitly recognized the extension of First Amendment safeguards for lawyers in court proceedings. *See, for example, Lewellen v. Raff,* 843 F.2d 1103, 1110-11 (8th Cir. 1988) (affirming district court finding that plaintiff presented sufficient evidence of retaliatory prosecution by prosecutor against criminal defense attorney motivated, at least in part, by the attorney's "vigorous defense of [his client]." And see *Canatella v. California,* 304 F.3d 843 (9th Cir. 2002) (recognizing attorney's First Amendment right to advocate for client for purposes of an over breadth challenge to disciplinary statute.)

Moreover, the Sixth Circuit has effectively limited the application of this Court's holding in *Legal Services Corporation v. Velazquez,* 531 U.S. 533 (2001), that invalidated a statute prohibiting legal services lawyers from challenging welfare laws. The Court found the restriction contravened the First Amendment, explaining, *inter alia,* that "[a]n informed, independent judiciary presumes an informed, independent bar." *Id.* at 545. Removing First Amendment protection for arguments raised in the course of state criminal proceedings substantially undermines this principle by excluding from constitutional review retaliatory conduct by the prosecutor against an attorney for his or her vigorous

representation of a client. Review is necessary to resolve the conflict between the Sixth and other Circuits, and to define the scope of First Amendment safeguards in the context of court proceedings.

I. REVIEW IS WARRANTED TO RESOLVE A CONFLICT CONCERNING WHETHER AN ATTORNEY IS ENTITLED TO ANY FIRST AMENDMENT PROTECTION IN THE CONTEXT OF COURT PROCEEDINGS.

The Sixth Circuit could not have been more definitive in eliminating all First Amendment protections for attorneys representing clients in court proceedings.

> [W]e hold that in the context of the courtroom proceedings, an attorney retains ***no personal First Amendment rights when representing his client in those proceedings***. (Emphasis added).

Mezibov v. Allen, 411 F 3d 712, 720-721 (6th Cir. 2005).

As a result of the Sixth Circuit's decision, a lawyer forfeits all personal First Amendment rights in speech, motions or pleadings made, filed or submitted in the context of criminal court proceedings. In so ruling, the Sixth Circuit relegated speech by a lawyer in legal proceedings to a level not deserving of a place on even the lowest rung of the First Amendment ladder. In short, in terms of social value, the Sixth Circuit decision equates a lawyer's decision in undertaking the representation of a client and advocacy on behalf of that client with speech that is obscene in nature or that creates a clear or present danger. Neither of these forms of speech is deserving of constitutional protection. By virtue

of the Sixth Circuit decision, speech by a lawyer is to be similarly treated.

The Sixth Circuit has determined without qualification or condition that an attorney's First Amendment rights "are not just limited in the courtroom, but are actually non-existent," *Lewter v. Kannensohn*, 2005 WL 3196610 (6th Cir. 2005) (unreported), *citing Mezibov v. Allen*. The decision below threatens on a wholesale basis a system of criminal justice that not only requires but is dependent upon effective and vigorous representation of those charged with criminal offenses.

Mezibov is also contrary to long-standing Supreme Court precedent recognizing the importance of protecting speech critical of government officials:

> There is, first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues. Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized. It is clear, therefore, that the public official designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.

Rosenblatt v. Baer, 383 U.S. 75, 85 (1966). By depriving attorneys of all First Amendment protection for their in-court speech, the Sixth Circuit has effectively removed the courtroom as any type of a forum for speech critical of public officials, even if a legal basis exists for the criticism.

In this case, Mr. Mezibov was attacked by the county prosecutor for filing pleadings during a criminal trial that "raised matters of public concern, i.e., a publicly elected county prosecutor's alleged conflict of interest and alleged 'outrageous and [u]nethical [c]onduct' in a criminal proceeding." *Mezibov v. Allen*, 411 F.3d at 724 (Moore, J., dissenting in part). As noted above, "[i]t is one thing to say that attorney's first amendment rights are limited or circumscribed in the courtroom as a result of their roles as advocates for their clients, but it is another thing entirely to say that those rights are completely non-existent." *Lewter v. Kennensohn*, 2005 WL 3196610 (6th Cir. Nov. 29, 2005) (Keith, J., dissenting at *6, criticizing the holding in *Mezibov)* (unreported).

The Court of Appeals purports to rest its holding on a series of decisions recognizing necessary limitations on an attorney's First Amendment right to speak during in-court proceedings. The Court of Appeals acknowledged that Mr. Mezibov's claim of a First Amendment right for in-court speech presented an issue of first impression in the Circuit and that the issue has not been "squarely addressed" by this Court. *Mezibov*, 411 F.3d at 717. Nevertheless, its holding denying all First Amendment protection to attorneys in in-court proceedings seemingly rests on this Court's *dicta* in *Gentile v. State Bar of Nevada* that "'in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has, is extremely circumscribed.'" *Mezibov,* 411 F.3d at 717, quoting, *Gentile v. State Bar of Nevada* 501 U.S. 1030, 1071 (1991). Of course, the Sixth Circuit goes well beyond circumscribing the right, by eliminating it all together.

Notably, Respondent has never contended that Petitioner violated any obligations or restraints imposed upon him by the

rules of evidence and procedure, or otherwise transgressed any court imposed limitations on counsel's in-court or extra-judicial speech regarding the underlying criminal case. The retaliation alleged in this case occurred after the trial of Mr. Mezibov's client had concluded precisely because the Hamilton County Prosecutor did not like the *content and vigor* of Mr. Mezibov's arguments during pre-trial proceedings. As the dissent in *Mezibov* explained,

> "Indeed, the motions filed [by Mezibov] in this case were not simply routine pre-trial motions, but rather were motions that raised matters of public concern, i.e., a publicly elected county prosecutor's alleged conflict of interest and alleged '[o]utrageous and [u]nethical [c]onduct' in a criminal proceeding."

Id., 411 F.3d at 724 (Moore, J., dissenting in part). Thus, the majority's reliance on this Court's *dicta* in *Gentile* to support its broad proscription of First Amendment protection is misplaced, in that the Court was referencing constitutionally permissible circumscription of an attorney's in-court conduct and decorum. Indeed, the *Gentile dicta* cited by the majority in *Mezibov* appears to rest on the assumption that some residuum of First Amendment coverage accompanies the attorney into court proceedings.

The Sixth Circuit's ruling conflicts with explicit and implicit holdings in two other Circuits. In *Lewellen v. Raff*, 843 F.2d 1103 (8th Cir. 1988), the Court of Appeals expressly recognized as actionable an attorney's claim that a prosecutor retaliated against him due, in part, to his in court representation of a criminal defendant. The Eighth Circuit found sufficient factual support for the district court's issuance of preliminary injunction against the retaliatory prosecution. In affirming the injunction the Court noted,

> The district court credited the testimony of Lewellen [plaintiff/attorney] and Sam Blount, a local businessman, as supporting the allegation that the prosecution was initiated because of the prosecutors' desire ***to retaliate against Lewellen for his vigorous defense of Banks.*** (Emphasis added).

Lewellen v. Raff, 843 F.2d at 1110. It was based, in part, upon these factual findings that the Court affirmed the issuance of the preliminary injunction barring the prosecutor from proceeding with the retaliatory prosecution. *Id.* at 1111.[2]

In *Levine v. United States Dist. Court for Cent. Dist.*, 764 F.2d 590, 595 (9th Cir. 1985), the Ninth Circuit invalidated as over-broad an order restraining the trial attorney's extrajudicial comments to the press regarding an espionage criminal prosecution. In so doing, however, the Court of Appeals implicitly found that, within the bounds of acceptable courtroom decorum, an attorney has a right protected by the First Amendment to advocate for, and file appropriate pleadings on behalf of, his client. "We recognize that attorneys . . . ***do not lose their constitutional rights at the courthouse door.***" (Emphasis added). *Id.* at 595. It would certainly be constitutionally incongruous in the context of courtroom proceedings to protect an attorney's right to make restrained comments regarding pending litigation but not protect counsel's right to file pleadings or proffer arguments within that litigation.[3]

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[2] The Eighth Circuit also found factual support for finding that racial discrimination may have also motivated the prosecution at issue. *Id.* at 1111-1112.

[3] The Ninth Circuit cites the ABA, *Model Code of Professional Responsibility* DR 7-107 (1979) as appropriate guidance. *Levine*

Providing First Amendment safeguards to an attorney's ethical advocacy for a client in a criminal proceeding would seem to be dictated by the logical extension of this Court's ruling in *Legal Services Corp. v. Velazquez,* 531 U.S. 533 (2001). In that decision, this Court leaves no doubt that an attorney's advocacy on behalf of his or her client comes well within the umbrella of First Amendment protections. The Court invalidated the government-imposed limitation on an attorney's First Amendment right to advance certain legal challenges to federal welfare regulations and decisions. *Id.* at 536-537. The Court emphasized that governmental efforts to limit the advocacy of attorneys has a consequential effect on the judiciary. "By seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power." *Velazquez,* 531 U.S. at 545. The same concern obtains here where the criminal defense attorney must now balance his ethical obligation to vigorously defend a client with concern about the sensibilities of the prosecutor.

Thus, the First Amendment protection recognized in *Velasquez* becomes a pyrrhic victory. While *Velasquez* bars statutory restrictions on the filing of certain claims by attorneys, the Sixth Circuit would deny First Amendment protection for the attorney's pursuit of such claims at the point where the claims are actually filed in court. These results are

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v. United States Dist. Court for Cent. Dist., 764 F.2d at 599. That provision allows comment without elaboration by a lawyer on "information contained in a public record." DR 7-107(A)(1). Obviously, the public record would include motions and arguments filed with the court.

incompatible with one another, and compel review by this Court.

II. REVIEW IS WARRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS AS TO THE PROPER STANDARD FOR FINDING ADVERSE ACTION IN A FIRST AMENDMENT RETALIATION CLAIM.

In *Mezibov*, the Sixth Circuit holds that an allegation of injury to an attorney's reputation and subsequent emotional distress is *de minimus* as a matter of law, and insufficient to meet the "adverse impact" element of a First Amendment retaliation claim. Thus, the decision of the Sixth Circuit sweeps away basic principles of § 1983 litigation established by this Court. This Court has determined that in the context of a § 1983 action "compensatory damages may include . . . such injuries as 'impairment of reputation . . ., personal humiliation, and **mental anguish and suffering.**'" *Memphis Community School District v. Stachura*, 477 U.S. 229, 307 (1986). (Emphasis in original).

By its holding, the Sixth Circuit adopted a decidedly more onerous pleading burden in § 1983 litigation for criminal defense attorneys who seek relief from retaliatory conduct by public officials in response to those attorneys' protected speech activities in the course of legal proceedings. In essence, the Sixth Circuit decision limits First Amendment retaliation claims by defense counsel to only those circumstances where defense counsel is actually chilled by retaliatory conduct from continuing to engage in protected activity. This holding is inconsistent with controlling precedent of this Court, and conflicts with decisions of the majority of federal appellate circuits that condition a showing of adverse impact upon an "objective" standard, i.e, whether

the retaliatory conduct in question "would" chill a defense counsel of ordinary firmness rather than upon a subjective standard requiring proof of an "actual" chill, the standard that the Sixth Circuit has now effectively established.

In crafting the appropriate pleading standard for criminal defense attorneys claiming injury arising out of First Amendment retaliation, the Sixth Circuit first holds that attorneys who agree to represent high profile clients voluntarily open themselves to defamatory criticism of their actions taken during the course of the litigation. *Mezibov* at 722. The retaliatory comments at issue herein, though, were not leveled at Mr. Mezibov during the course of his in-court representation of his client. Rather, the verbal attacks were leveled at Mr. Mezibov by the County Prosecutor after the trial was over, in an attempt to challenge what the Prosecutor deemed to be personal attacks against him and his office contained in pleadings filed by Mr. Mezibov. Paradoxically, Mr. Allen's non-defamatory, out-of-court statements were accepted as having First Amendment protection by the Sixth Circuit, while Mr. Mezibov's in-court speech on behalf of his client was not. *Id.*

Thus, the Sixth Circuit, without specifically delineating the contours of criminal defense attorney pleading requirements in the First Amendment retaliation context, clearly expects criminal defense attorneys to thicken their skin in anticipation of post-trial attacks by displeased and presumably thin-skinned prosecutors. As Mr. Mezibov was able on appeal to fully clear hi client of all criminal charges, the Sixth Circuit concludes that he should be satisfied with his victory as a substitute for a remedy under § 1983, that citizens who are not criminal defense attorneys would otherwise have. Indeed, in no uncertain terms, the Court of Appeals concludes that Mr. Mezibov's successful fulfillment of his ethical duty

to his client forecloses any possibility that he suffered any cognizable "adverse action" for purposes of a First Amendment retaliation claim. *Id.* at 723.

In most circuits, an actionable First Amendment retaliation claim hinges on whether a plaintiff can demonstrate that he or she suffered an adverse action that would deter a person of ordinary firmness from continuing to engage in the constitutionally protected conduct. *See e.g. Bennett v. Hendrix*, 423 F.3d 1247, 1250 (11th Cir. 2005); *Constantine v. Rector and Visitors of George Mason University*, 411 F.3d 474, 499 (4th Cir. 2005); *Keenan v. Tejada*, 290 F.3d 252, 258 (5th Cir. 2002); *Mitchell v. Horn*, 318 F.3d 523, 530 (3d Cir. 2003); *Garcia v. City of Trenton*, 348 F.3d 726, 728 (8th Cir. 2003); *Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 585 (D.C. Cir. 2002); *Poole v. County of Otero*, 271 F.3d 955, 960 (10th Cir. 2001); *Mendicino Envtl. Ctr. v. Mendicino County*, 192 F.3d 1283, 1300 (9th Cir. 1999); *Agosto-ve-Feliciano v. Aponte-Roque*, 889 F.2d 1209, 1217 (1st Cir. 1989); *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982). In all of these circuits the "ordinary firmness" standard is an objective one. *See Bennet*, 423 F.3d at 1251-52, *citing to Garcia*, 348 F.3d at 728 (ordinary firmness test is "well established"); *Toolasprashad*, 286 F.3d at 585 (ordinary firmness test is "widely accepted"); *Keenan*, 290 F.3d at 258 (ordinary firmness test is "well-settled").

In the context of a First Amendment retaliation case brought by an attorney for constitutionally protected speech in the courtroom setting, the adverse action component of the claim, according to the Sixth Circuit, depends on whether the retaliatory conduct in question would "deter a criminal defense attorney of ordinary firmness from continuing to file motions and vigorously defend his clients." *Mezibov*, 411 F.3d at 721. On its face, the foregoing formulation does not

appear to differ from the objective standard of most other circuits. The decision of the Sixth Circuit, however, deviates markedly from the commonly adopted "objective" standards in determining whether a cognizable adverse action has resulted from retaliatory conduct. Closely considered, the gloss placed on that standard by the Sixth Circuit has transformed the objective test for an adverse action into an unattainable standard that cannot be met by any attorney who fulfills his ethical obligation to his client. The Sixth Circuit decision, for all intent and purposes, leaves defense counsel vulnerable to the most blatant retaliation for in-court speech without any opportunity for redress, merely because defense counsel is unable to plead that he or she was actually "chilled" from continuing to perform his or her professional obligations.

The Sixth Circuit decision is not alone in adopting a subjective or "actual chill" requirement for the prosecution of a First Amendment retaliation claim. The Second Circuit likewise ruled that in order to prevail a plaintiff must show that his or her First Amendment rights "were actually chilled." *See Curley v. Village of Suffern*, 268 F.3d 65, 75 (2d Cir. 2001). In *Curley*, a plaintiff who had leveled public criticism of government officials during the course of a political campaign later claimed that he was the victim of an unlawful arrest and prosecution in retaliation for his comments. The plaintiff, however, had continued to participate in political activities and even vied for political office following his arrest and prosecution. In these circumstances, the Second Circuit found that the plaintiff could not succeed with his First Amendment retaliation claim. "Where a party can show no change in his behavior he has quite plainly shown no chilling of his first amendment rights to free speech." 268 F.3d at 73, *citing to Singer v. Fulton County Sheriff*, 63 F.3d 110, 120 (2d Cir. 1995); *Spear v.*

Town of West Hartford, 954 F.2d 63, 67 (2d Cir. 1992); *Davis v. Village Park II, Realty Co.*, 578 F.2d 461, 464 (2d Cir. 1998).[4]

The Sixth Circuit decision similarly limits the availability of § 1983 First Amendment retaliation claims to only the least hardy of speakers. Under the Sixth Circuit formulation for adverse action, attorneys, apparently, must suffer, as an occupational hazard, purposefully hurtful conduct by government officials in response to their vigorous representation of their clients.

In *Bennett*, the Eleventh Circuit clearly exposed the defects and problems inherent in such an across-the-board test that limits First Amendment retaliation claims to situations where a plaintiff must plead and prove that he or she was actually chilled from continuing to engage in protected conduct. "[A] subjective standard would expose public officials to liability in some cases, but not in others for the very same conduct, depending upon the plaintiff's willingness to fight." 423 F.3d at 1251, *citing Constantine,* 411 F.3d at 500. Moreover, "there is no reason to 'reward' government officials for picking on usually hardy speakers." *Id.*

Even accepting that the definition of "adverse action" is not static across contexts, *see Thaddeus X v. Blatter*, 175 F.3d

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[4] While continuing to require the "actual chill test" for First Amendment retaliation claims by private parties, the Second Circuit recognizes a more relaxed standard for public employees who assert that they have been victims of official retaliation for protected speech activity. For public employees, the objective test of whether the government's conduct "would" deter a person of ordinary firmness from expressing his or her constitutional rights obtains. *Morrison v. Johnson*, 429 F.3d 48, 51 (2d Cir. 2005).

378, 398 (6th Cir. 1999), it is not appropriate to elevate the pleading requirements for a First Amendment retaliation case brought by a criminal defense attorney to require an allegation of an actual chill based upon the false assumption that a criminal defense attorney of ordinary firmness would not be deterred from vigorously defending his client as a consequence of an alleged defamation. See *Mezibov,* 411 F.3d at 721. To accept the Sixth Circuit proposition is to invite government officials to lambaste "with both barrels" any defense counsel who seeks to vigorously and effectively represent his or her client in court. Such a formulation of adverse action in the context of in-court speech by criminal defense counsel all but eliminates the First Amendment as a constitutional right available to those attorneys who strive to serve their clients and honor their profession. As Judge Moore stated, "[a]n attorney's primary role is to serve as his or her client's representative and advocate in the judicial process, and it is for this very reason that the attorney's First Amendment rights in the courtroom must be zealously guarded." *Id.* at 724 (Moore, J., dissenting). This Court should grant review to resolve this constitutional anomaly and end a grave threat this decision poses to the criminal defense bar.

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX A

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 03-3973

[Filed September 29, 2005]

MARC D. MEZIBOV Plaintiff-Appellant,	)
v.	)
MICHAEL K. ALLEN, et al., Defendants-Appellees.	)

ORDER

BEFORE: SILER, BATCHELDER, and MOORE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT.

APPENDIX B

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 03-3973

[Filed June 16, 2005]

MARC D. MEZIBOV Plaintiff-Appellant,	)
v.	)
MICHAEL K. ALLEN, et al., Defendants-Appellees.	)

OPINION

ALICE M. BATCHELDER, Circuit Judge. Plaintiff-Appellant Marc D. Mezibov ("Mezibov") appeals the district court's dismissal, pursuant to FED. R. CIV. P. 12(b)(6), of his 42 U.S.C. § 1983 claim of retaliation against Hamilton County Prosecutor Michael K. Allen ("Allen"). Mezibov, a criminal defense attorney, claims that Allen uttered defamatory comments about Mezibov in retaliation for Mezibov's pursuing his First Amendment right to "file motions and raise legitimate defenses" on behalf of his clients in the courtroom. Because the activity that Mezibov claims subjected him to retaliation is not a constitutionally protected

activity, and because, even if it were, a criminal defense attorney of ordinary firmness would not have been chilled from engaging in that activity as a consequence of Allen's adverse action, we affirm the district court's dismissal of Mezibov's § 1983 claim.

BACKGROUND

Mezibov is an attorney licensed to practice in the state of Ohio. He served as defense counsel for Dr. Jonathan Tobias during Tobias's criminal trial in Hamilton County, Ohio, on 26 counts of abuse of a corpse. Allen was the Hamilton County Prosecutor during Dr. Tobias's prosecution. In the course of representing Dr. Tobias, Mezibov filed three motions seeking to dismiss the indictment and disqualify Allen on the basis that he had engaged in improper conduct. The trial court denied the motions, and on October 1, 2001, a jury convicted Dr. Tobias of two of the 26 counts of abuse of a corpse.

Mezibov alleges that immediately following the jury verdict, Allen released a statement to the local media which said the following:

> Obviously, this [Mr. Mezibov] is a man who doesn't try too many cases and the verdict shows that. If I were Dr. Tobias, I would ask for my money back . . . . Real criminal defense attorneys, lawyers who try cases every day, don't do that. They don't throw mud . . . . Obviously it backfired in their face.

Mezibov further alleges that later that month, on October 21, 2001, Allen appeared on a local television show known as "Hot Seat" and made the following comments:

[Mr. Mezibov] wanted to make it a show trial where he could attack me, he could attack Dr. Parrott, but frankly it blew up in his face and now his client, because of [Mezibov's] conduct, faces two years in prison and the loss of his medical license. You know, in consumer law we have a saying let the buyer beware. I think in law, you ought to have a saying, let the client beware . . . . Had Dr. Tobias approached us early on about cooperating with the prosecution and working for us in a conviction of Mr. Condon, that's something that in all likelihood we would have entertained. But, his lawyer, Marc Mezibov, chose not to do that. And it makes you wonder, here's a man that now is going to lose his medical license, faces two years in jail, who may very well have been able to work with us and escape prosecution. It makes you wonder about the tactics of defense counsel and their intentions quite frankly . . . . And when my ethics are questioned and when I'm called unethical, you're gonna get it back and you're gonna get it back with both barrels because I have to. I can't permit that to happen. Real defense lawyers, the Scott Croswells of the world, the Merle Shiverdeckers, they try cases on the facts of the case. They try cases from the testimony that comes from the witness stand and the law that is given from the judge. I think Mr. Mezibov, what he wanted to do, he wanted his show trial. He wanted to be able to attack me, he wanted to be able to attack Dr. Parrott, and he wanted to be able to attack the Republican party . . . . I have to say had this matter been handled in the normal fashion by a defense lawyer who was interested in his client's best interest rather than having a political show trial, Dr. Tobias very well could have fared a lot better than he did.

In July 2002, Mezibov filed this 42 U.S.C. § 1983 action, alleging that Allen made defamatory comments under color of state law, in an effort to "retaliate against Mezibov for filing motions and raising legitimate defenses in his capacity as

defense counsel in the criminal proceedings initiated and prosecuted by Defendant Allen . . . against Dr. Tobias." In other words, Mezibov claims he was being retaliated against for "exercising his First Amendment right to protect his client's Sixth Amendment and other constitutional rights." Mezibov further alleges that as a result of Allen's comments he "has suffered damage to his professional reputation and emotional anguish and distress entitling him to compensation."

The district court dismissed Mezibov's complaint pursuant to FED. R. CIV. P. 12(b)(6), holding that in filing motions and vigorously defending his client in court, Mezibov was not engaged in a constitutionally protected activity. The district court noted that although Mezibov claims his activities are protected under the First Amendment, they are simply discrete functions of the practice of law, which is not a privilege or immunity protected by the Constitution. Since Mezibov failed to allege that he was engaged in a constitutionally protected activity, the court reasoned that he did not properly state a claim for relief under 42 U.S.C. § 1983, and granted Allen's motion to dismiss. This appeal followed.

ANALYSIS

I. Standard of Review

We review de novo the grant or denial of a motion to dismiss under FED. R. CIV. P. 12(b)(6). *Barrett v. Harrington*, 130 F.3d 246, 251 (6th Cir. 1997). To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory. *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859

F.2d 434, 436 (6th Cir. 1988). Nonetheless, conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss. *Jackson v. Heh*, 215 F.3d 1326 (Table), 2000 WL 761807 at *2 (6th Cir. 2000) (citing *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995)).

II. Retaliation Under 42 U.S.C. § 1983

To survive a motion to dismiss a claim under 42 U.S.C. § 1983, the plaintiff must properly allege two elements: (1) the defendant was acting under color of state law, and (2) the offending conduct deprived the plaintiff of rights secured under federal law. *Bloch v. Ribar*, 156 F.3d 673, 677 [*717] (6th Cir. 1998). As to the first element, by alleging that Allen, in his role as prosecutor, made defamatory statements to the media concerning a trial that his office prosecuted, Mezibov has sufficiently alleged that Allen was acting under color of state law for purposes of 42 U.S.C. § 1983.*See id.* at 677-78 (holding that a county sheriff acted under color of state law when he issued press releases concerning matters of official business in which he was involved).

With regard to the second element of a § 1983 claim, when the alleged violation of federal law is that a government official retaliated against a plaintiff for exercising his constitutional rights, as in this case, the plaintiff must ultimately prove three sub-elements: (1) the plaintiff engaged in constitutionally protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) the adverse action was motivated at least in part by the plaintiff's protected conduct. *Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) (en banc). The district court dismissed Mezibov's claim under the first of these sub-

elements by determining that his filing motions and defending his client in court were not activities protected under the First Amendment. We agree.

A. Protected Interest

Whether an attorney can claim First Amendment protection on his own behalf for his filing motions and making courtroom statements on behalf of his client is a question of first impression in this circuit. While the Supreme Court has not squarely addressed this question, it has noted, in dicta, that "it is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1071, 115 L. Ed. 2d 888, 111 S. Ct. 2720 (1991). Furthermore, it appears that no circuit court has ever actually granted an attorney relief under the First Amendment for this narrow category of speech.

It is not surprising that courts have thus far been reluctant to allow the First Amendment to intrude into the courtroom. At first blush, the courtroom seems like the quintessential arena for public debate, but upon closer analysis, it is clear this is not, and never has been, an arena for *free* debate. *Zal v. Steppe*, 968 F.2d 924, 932 (9th Cir. 1992) (Trott, J., concurring); *see Berner v. Delahanty*, 129 F.3d 20, 26 (1st Cir. 1997) (characterizing the courtroom as a nonpublic forum for purposes of First Amendment analysis). An attorney's speech in court and in motion papers has always been tightly cabined by various procedural and evidentiary rules, along with the heavy hand of judicial discretion. In fact, judges regularly fine attorneys, and even throw them in jail from time to time, as a direct consequence of attorneys' in-court speech, and it appears no circuit court has ever found

this to violate the First Amendment.[1] When an attorney believes that the trial court improperly applied the law or relevant rules in preventing him from presenting information to the judge or jury, his sole remedy traditionally has been to appeal the judge's application of the particular rule of exclusion, rather than to claim First Amendment protection. *See Gentile*, 501 U.S. at 1071. Moreover, any such challenge is almost always grounded in the rights of the client, rather than any independent rights of the attorney. *See Zal*, 968 F.2d at 931 (Trott, J., concurring) ("In the courtroom, during a judicial proceeding, an attorney's 'First Amendment' rights depend exclusively on his client's trial rights."); *see also Legal Services Corporation v. Velazquez*, 531 U.S. 533, 149 L. Ed. 2d 63, 121 S. Ct. 1043 (2001) (upholding First Amendment challenge by indigent clients to government funding regime that prevented their attorneys from presenting to a court on the clients' behalf certain otherwise-reasonable arguments against the validity of welfare laws).

Mezibov reminds us that "attorneys and other trial participants do not lose their constitutional rights at the courthouse door."[2] *Levine v. United States Dist. Court for the*

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[1] It is clear, however, that attorneys retain some level of due process protection in connection with these punishments. *See Pounders v. Watson*, 521 U.S. 982, 991, 138 L. Ed. 2d 976, 117 S. Ct. 2359 (1997) (noting that "the Due Process Clause no doubt imposes limits on the authority to issue a summary contempt order").

[2] We note that, despite the apparent implications of this statement for attorney speech in the courtroom, *Levine* actually dealt with an attorney's out-of-court communications with the media, a realm where the attorney clearly has some First Amendment rights. *See Gentile*, 501 U.S. at 1051, 1073-76.

Cent. Dist. of Cal., 764 F.2d 590, 595 (9th Cir. 1985). This grandiose statement is of little help, however, when it comes to analysis under the First Amendment, where rights have always depended largely upon the nature of the forum. The courtroom is a nonpublic forum, *Berner*, 129 F.3d at 26, where the First Amendment rights of everyone (attorneys included) are at their constitutional nadir. In fact, the courtroom is unique even among nonpublic fora because within its confines we regularly countenance the application of even viewpoint-discriminatory restrictions on speech. *See, e.g.*, *Zal*, 968 F.2d 924 (upholding against First Amendment challenge attorney's contempt citations for attempting to present excluded defenses to the jury and for using words forbidden by the judge, such as "abortion," "fetus," and "rights of the unborn"), *cert. denied*, 506 U.S. 1021, 121 L. Ed. 2d 582 (1992); FED. R. EVID. 404(b) (banning attorney from arguing that "other crimes, wrongs, or acts" are relevant to determining a person's action in the instant case); FED. R. CIV. P. 11 (granting district court the authority to sanction attorney for advancing a point of view it deems to be frivolous); FED. R. APP. P. 34, 38 (granting appellate court the authority to deny oral argument, and even award damages to appellee, if it deems appellant's point of view to be frivolous). *Compare* FED. R. EVID. 412(a) (banning attorney from arguing in a sexual misconduct case that an alleged victim's other sexual behavior is relevant to the issue of consent in the instant case) *with* FED. R. EVID. 413(a) (expressly allowing attorney to argue in a sexual misconduct criminal case that defendant's prior commission of sexual assault is relevant to whether he behaved similarly in the instant case).

Furthermore, in its equating attorneys with other trial participants, the quoted proclamation from *Levine* highlights an important flaw in Mezibov's argument. We cannot believe

(and have come across no authority to suggest) that other trial participants, with the possible exception of an actual party to the case,[3] possess any First Amendment right to speak up or otherwise present a point of view in the courtroom. We can conceive of no such right for jurors, court reporters, bailiffs, or spectators to interrupt a judicial proceeding with their questions or musings. Therefore, in finding no First Amendment rights on the part of the attorney participating in a judicial proceeding, we are simply re-affirming the commonsense principle that attorneys do not possess "any right in the first amendment that is not the common legacy of every citizen." *Ukrainian-American Bar Assoc., Inc. v. Baker*, 282 U.S. App. D.C. 225, 893 F.2d 1374, 1381 (D.C. Cir. 1990). In fact, the Supreme Court has gone even further, declaring that there are times when an attorney's First Amendment rights are less than those of the common citizen. *See Gentile*, 501 U.S. at 1071-74.

Moreover, an attorney's job in the courtroom, although it necessarily includes speech, is fundamentally inconsistent with the basic concept of "free" speech. As an initial matter, that the attorney has any permission to speak in a judicial proceeding is entirely dependent upon his representation of a client; absent that client, the attorney is completely silenced. But even once the attorney has his client, his advocacy in the courtroom and in filings cannot honestly be characterized as "free" speech. As noted above, myriad procedural and evidentiary rules, along with a liberal allowance for judicial discretion, operate to severely limit what an attorney can say

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[3] As discussed below, the Supreme Court's opinion in *Legal Services Corporation v. Velazquez*, 531 U.S. 533, 149 L. Ed. 2d 63, 121 S. Ct. 1043 (2001), arguably grants some limited First Amendment rights to parties to present legal arguments to a court.

in the courtroom. But more fundamentally, by choosing to represent a client in court, the attorney assumes a role that is in absolute conflict with his exercising free speech. For example, the attorney is bound by this voluntary relationship to make arguments only to the benefit of his client, regardless of what the attorney himself might like to say. *See* OHIO CODE OF PROF'L RESPONSIBILITY EC 7-9 (2005)[4] (requiring attorney to "always act in a manner consistent with the best interests of his client"); OHIO CODE OF PROF'L RESPONSIBILITY EC 7-24 (2005) (declaring that "the expression by a lawyer of his personal opinion . . . is not a proper subject for argument to the trier of fact"). In addition, an attorney is ethically bound to make reasonable arguments on behalf of his client, even if the attorney disagrees with them. *See* OHIO CODE OF PROF'L RESPONSIBILITY EC 7-4 (2005) (allowing attorney to "urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail"); OHIO CODE OF PROF'L RESPONSIBILITY DR 7-101 (2005) (requiring attorney to, within the bounds of his professional judgment, "seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules"). Therefore, because an attorney, by the very nature of his job, voluntarily agrees to relinquish his rights to free expression in the judicial proceeding, we see no basis for concluding that his free speech rights are violated by a restriction on that expression.[5]

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[4] The Ohio Code of Professional Responsibility governs the conduct of Ohio attorneys, such as Mezibov.

[5] We note that throughout his complaint Mezibov emphasizes that his ethical obligations as an attorney required him to file the motions at issue in this case, apparently thinking this helps his

Mezibov cites *Legal Services Corporation v. Velazquez*, 531 U.S. 533, 149 L. Ed. 2d 63, 121 S. Ct. 1043 (2001), for the proposition that an attorney has a First Amendment right to advocate on behalf of his client in court. The Supreme Court in *Velazquez* upheld a First Amendment challenge by indigent clients to a congressional statute allocating federal funds to local organizations for the purpose of providing legal representation to poor people in non-criminal proceedings, but with a condition prohibiting "legal representation . . . involving an effort to amend or otherwise challenge existing welfare law." *Id.* at 536-37. The Court interpreted this condition as "preventing an attorney from arguing to a court" that a state statute conflicts with a federal statute or that either a state or federal statute violates the Constitution. *Id.* at 537. The Court characterized the congressional funding scheme as a limited public forum, and thus found its viewpoint-discriminatory condition constitutionally impermissible.

Although it is Mezibov's most helpful authority for his view that an attorney has a First Amendment right to advocate in court, *Velazquez* is actually quite different from the case at bar. First, *Velasquez* was a challenge by the Legal Services Corporation and its indigent clients seeking to vindicate the clients' own First Amendment interests in having their otherwise-reasonable arguments heard in court; nowhere does *Velazquez* recognize a First Amendment right personal to the attorney independent of his client, as Mezibov seeks here. Second, *Velazquez* involved a regulation akin to a prior restraint (i.e., the clients' otherwise-reasonable arguments were entirely excluded from the courtroom before the clients had a chance even to advance them), among the most noxious

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argument that his activity is protected as "free" speech.

of affronts to the First Amendment. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558, 43 L. Ed. 2d 448, 95 S. Ct. 1239 (1975) ("Any system of prior restraint . . . comes to this Court bearing a heavy presumption against its constitutional validity."); *see also Velazquez*, 531 U.S. at 544-45, 547-48. Mezibov, however, presented his arguments fully before being subjected to the alleged retaliation. Third, the regulation at issue in *Velazquez* forbade both in-court argument by the attorney and out-of-court consultation between attorney and client[6] regarding the restricted issues, *Velazquez*, 531 U.S. at 544; the alleged retaliation in the instant case relates only to the narrower category of attorney speech in the context of a judicial proceeding. Fourth, *Velazquez* involved the complicating twist of a government funding program that the Court deemed a limited public forum for First Amendment purposes, *id.* at 543-44; the instant case involves only speech in the courtroom, which as a nonpublic forum is less conducive to free speech rights. *See Berner*, 129 F.3d at 26. For these reasons it cannot be said that *Velazquez* recognizes an attorney's First Amendment rights independent of his client's in the context of a judicial proceeding.[7]

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[6] As mentioned in *supra* note 2, attorneys clearly retain some First Amendment rights outside of the courtroom, even for speech that touches upon their representing clients.

[7] It should also be noted that a broad reading of *Velazquez* would call into question the rules of several circuits that forbid citation to unpublished legal opinions, which effect a prior restraint on both the attorney and the client seeking to present an otherwise-relevant argument to the court. *See, e.g.*, 2D CIR. R. 0.23; 7TH CIR. R. 53(b)(2)(iv); 9TH CIR. R. 36-3; FED. CIR. R. 47.6(b).

We think the district court was correct in its basic conclusion: in filing motions and advocating for his client in court, Mezibov was not engaged in free expression; he was simply doing his job. In that narrow capacity, he voluntarily accepted almost unconditional restraints on his personal speech rights, since his sole raison d'etre was to vindicate his client's rights. For these reasons, we hold that in the context of the courtroom proceedings, an attorney retains no personal First Amendment rights when representing his client in those proceedings. Therefore, Mezibov has failed to allege that he was engaged in constitutionally protected conduct as the precipitating factor for his alleged retaliation, and his claim under 42 U.S.C. § 1983 was properly dismissed.

B. Adverse Action

Even if we were not convinced that Mezibov's advocacy is not protected under the First Amendment, we would affirm the dismissal of his claim due to his failure to allege that he suffered an adverse action that "would deter a person of ordinary firmness from continuing to engage in [the constitutionally protected] conduct." *Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) (en banc). As an initial matter, pursuant to this court's en banc decision in *Thaddeus-X*, we are required to "tailor[]" our analysis under the "adverse action" prong to the circumstances of this specific retaliation claim. *Id.* at 398 (requiring specific tailoring and noting that "prisoners may be required to tolerate more than public employees, who may be required to tolerate more than average citizens, before an action taken against them is considered adverse"). Thus, the appropriate formulation of the "adverse action" prong in Mezibov's case is whether the alleged defamation would deter a criminal defense attorney of ordinary firmness from continuing to file motions and vigorously defend his client. *See Mattox v. City of Forest*

Park, 183 F.3d 515, 522 (6th Cir. 1999) (formulating test under "adverse action" prong for elected city council member as whether a "public official of ordinary firmness" would be deterred from exercising her First Amendment rights).

We recognize that in a retaliation case, "since there is no justification for harassing people for exercising their constitutional rights [the effect on freedom of speech] need not be great in order to be actionable." *Thaddeus-X*, 175 F.3d at 397 (quoting *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982)). Nevertheless, since § 1983 is a tort statute, we must be careful to ensure that real injury is involved, lest we "trivialize the First Amendment" by sanctioning a retaliation claim even if it is unlikely that the exercise of First Amendment rights was actually deterred. *Id.* (quoting *Bart*, 677 F.2d at 625).

In *Mattox v. City of Forest Park*, 183 F.3d 515 (6th Cir. 1999), we addressed First Amendment retaliation claims on behalf of an elected city council member and a former firefighter who initiated an investigation of the fire department. The city council member, Mattox, claimed that defendants, in retaliation for her speech on matters of public concern, released embarrassing information about her that contributed to her losing the next election. We noted that as an elected public official, Mattox voluntarily opened herself to criticism of her actions and political stances, but that discrediting her in retaliation for her exercise of First Amendment rights was "inappropriate and unfortunate." *Id.* at 522. Nonetheless, we emphasized that she was merely criticized-not fired-for her views, and that "public officials may need to have thicker skin than the ordinary citizen," and thus found that Mattox's alleged injury did not meet the "adverse action" requirement for retaliation. *Id.*

The firefighter, Holly, alleged that defendants released information regarding a traumatic childhood incident and her personal relationships with members of the fire department in retaliation for her First Amendment activities. We noted that since Holly's embarrassing personal statements were irrelevant to the investigation, making them public in retaliation for her First Amendment activities would be "improper." *Id.* at 523. Nevertheless, we held that despite any such retaliatory intent, Holly's allegations did not satisfy the "adverse action" prong. In so doing we emphasized that Holly was merely claiming a generalized harm to her character and reputation, that "nowhere does she attempt to concretize her personal injury," and that "without anything more specific," Holly's allegations do not meet the constitutional threshold for First Amendment retaliation. *Id.*

For purposes of "adverse action" analysis, Mezibov is a hybrid of the two plaintiffs in *Mattox*. Like Mattox, Mezibov, as an attorney taking on a high profile case, "voluntarily placed [himself] open to criticism of [his] actions." *See id.* at 522. As such, Mezibov must have a "thicker skin than the ordinary citizen"[8] when it comes to enduring criticism for his behavior, even if it is protected speech under the First

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[8] We do not address the issue of whether Mezibov is a "public figure" for First Amendment purposes. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342, 345, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974) (requiring, in accordance with the First Amendment, a standard of knowing falsity or reckless disregard in order for defamation recovery by public figures, including those who have "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved"). We only note the inherently public nature of Mezibov's position for purposes of properly tailoring the "adverse action" analysis under *Thaddeus-X*. *See Thaddeus-X*, 175 F.3d at 398.

Amendment. *See id.* And like Holly, Mezibov has failed to allege a "specific" or "concrete" personal injury. *See id.* at 523. He merely claims "damage to his professional reputation and emotional anguish and distress," the very same kind of harms we found insufficient in *Mattox*. See id.

Furthermore, in analyzing the extent of the "adverse action" alleged by Mezibov, we must be careful to take into account only those comments made by Allen that could reasonably be construed as defamatory, lest we trample on the First Amendment rights that Allen retains as a government official. *See McBride v. Village of Michiana*, 100 F.3d 457, 462 (6th Cir. 1996) (cautioning in a § 1983 retaliation case that "the proper exercise by [government officials] of their own free speech rights cannot serve as the basis for imposition of liability upon those individuals"). In the instant case, Mezibov filed public motions with the court accusing Allen of unethical conduct. It would be inconsistent with core First Amendment principles and basic notions of fairness not to allow Allen to respond to these allegations to the extent his out-of-court comments were not defamatory, even if that response was (quite naturally) prompted by constitutionally protected speech by Mezibov.

With all that in mind, we are not persuaded that a criminal defense attorney of ordinary firmness would be deterred from vigorously defending his clients as a consequence of the alleged defamation in this case. First, as an attorney in a highly publicized case, Mezibov must be expected to endure some scrutiny for his actions. Second, any harm to Mezibov as a result of Allen's speech is too minimal to be constitutionally cognizable. Mezibov alleges no specific harm-only a generalized harm to his character and reputation. *See Mattox*, 183 F.3d at 521-22 (noting that while in some cases "embarrassment, humiliation, and emotional distress" are

actionable under § 1983, such harm is not equivalent to being fired or suspended from one's job). Furthermore, the substance of Allen's out-of-court comments was basically that Mezibov is a bad attorney, that he is inexperienced, and that he was putting his own interests before those of his client. To the extent these comments are not constitutionally protected in their own right, we do not think they exact a harm upon Mezibov that would deter an ordinary criminal defense attorney from vigorously representing his clients. If anything, we think the opposite: that such comments would spur the typical attorney to go out of his way to prove them wrong. In fact, that appears to be just what happened in Mezibov's case. After Allen made his comments, Mezibov was successful in getting his client's conviction reversed on appeal. *See State v. Tobias*, 2003 Ohio 2336, 2003 WL 21034555 (Ohio Ct. App. 2003). Therefore, Mezibov has not alleged sufficient facts to satisfy the "adverse action" prong for a retaliation claim.

CONCLUSION

In filing motions and vigorously defending his client in a judicial proceeding, Mezibov was not engaged in speech protected by the First Amendment; thus, he has failed to allege the protected interest necessary to succeed on his retaliation claim. Furthermore, the defamation Mezibov alleges does not constitute an adverse action sufficient to deter a criminal defense attorney of ordinary will from vigorously defending his client. Therefore, we **AFFIRM** the district court's dismissal of Mezibov's claim under 42 U.S.C. § 1983.

CONCURRING IN PART, DISSENTING IN PART

KAREN NELSON MOORE, Circuit Judge, concurring in part and dissenting in part. Because I emphatically disagree with the majority's alternative holding that, "in the context of the courtroom proceedings, an attorney retains no personal First Amendment rights when representing his client in those proceedings," Maj. Op. at 6, I dissent.

The majority's conclusion that there are "no First Amendment rights on the part of the attorney participating in a judicial proceeding," Maj. Op. at 5, first rests on the inference that, because speech in a courtroom setting is subject to considerable restrictions, the First Amendment simply does not apply inside the courtroom. I believe, however, that such an analysis is deeply flawed. While the Supreme Court and others have, on several occasions, upheld restrictions on courtroom speech, they have done so, not because First Amendment rights do not exist in the courtroom, but rather because such restrictions served to protect a defendant's constitutional right to a fair trial and to preserve the dignity of the courts.[1] *See Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1081-82, 115 L. Ed. 2d 888, 111 S. Ct. 2720 (1991) (O'Connor, J., concurring) ("Lawyers are officers of the court and, as such, may legitimately be subject to ethical precepts that keep them from engaging in what otherwise might be constitutionally protected speech. *This*

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[1] The majority's reliance on cases upholding rules of ethics and procedure that strictly limit attorney speech is also questionable because the case at bar does not involve a challenge to restrictions imposed by the court in its role as protector of fair-trial rights and guardian of the judicial process, but rather retaliation by a county prosecutor in his role as an adversary in the litigation.

does not mean, of course, that lawyers forfeit their First Amendment rights, only that a less demanding standard applies.") (emphasis added, citation omitted); *United States v. Gurney*, 558 F.2d 1202, 1209-10 (5th Cir. 1977) (in affirming limitations on media access to court proceedings, explaining that, "It is the trial judge's primary responsibility to govern judicial proceedings so as to ensure that the accused receives a fair, orderly trial comporting with fundamental due process. The trial judge is therefore granted broad discretion in ordering the daily activities of his court . . . . Within this discretion, therefore, the district judge can place restrictions on parties, jurors, lawyers, and others involved with the proceedings *despite the fact that such restrictions might affect First Amendment considerations*. Sixth Amendment rights of the accused must be protected always.") (emphasis added, citations omitted). By stating that the First Amendment has no place in the courtroom, the majority also betrays the historical role of litigation as providing a forum for the expression of core political speech, *see In re Primus*, 436 U.S. 412, 428, 56 L. Ed. 2d 417, 98 S. Ct. 1893 (1978) (holding unconstitutional restrictions on non-profit organization's solicitation of prospective litigants, explaining that "for the ACLU, as for the NAACP, 'litigation is not a technique of resolving private differences'; it is 'a form of political expression' and 'political association'") (quoting *NAACP v. Button*, 371 U.S. 415, 429, 431, 9 L. Ed. 2d 405, 83 S. Ct. 328 (1963)), instead relegating attorney speech to a level heretofore occupied only by such speech as obscenity and fighting words.[2] Indeed, the motions filed in this case were

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[2] Indeed, the Supreme Court has recognized that even such lower-value speech as obscenity and fighting words is not wholly unprotected by the First Amendment. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 383-84, 120 L. Ed. 2d 305, 112 S. Ct. 2538

not simply routine pre-trial motions, but rather were motions that raised matters of public concern, i.e., a publicly elected county prosecutor's alleged conflict of interest and alleged "outrageous and unethical conduct" in a criminal proceeding. Joint Appendix ("J.A.") at 7-8 (Compl. P 10); *see* OHIO REV. CODE § 309.01 (providing for election of county prosecutors).

The majority also rests its holding that attorneys have no First Amendment rights in the courtroom on the belief that attorneys are simply like "other trial participants" who have no right "to interrupt a judicial proceeding with their questions or musings." Maj. Op. at 5. However, I do not share the view that an attorney is simply another trial participant or that an attorney's filing of motions seeking the dismissal of criminal charges against his or her client is somehow akin to "interruptions" by "jurors, court reporters, bailiffs, or spectators." Maj. Op. at 5. An attorney's primary role is to serve as his or her client's representative and advocate in the judicial process, and it is for this very reason that an attorney's First Amendment rights in the courtroom

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(1992) ("We have sometimes said that these categories of expression are not within the area of constitutionally protected speech, or that the protection of the First Amendment does not extend to them. Such statements must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand characterizing obscenity as not being speech at all. What they mean is that these areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.) -- not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content.") (internal quotation marks and citations omitted).

must be zealously guarded.[3] The Supreme Court has long recognized that parties often need the assistance of a trained, professional advocate who will represent their interests throughout the judicial process.*See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 546, 149 L. Ed. 2d 63, 121 S. Ct. 1043 (2001) ("It is no answer to say the restriction on speech is harmless because, under LSC's interpretation of the Act, its attorneys can withdraw. This misses the point. The statute is an attempt to draw lines around the LSC program to exclude from litigation those arguments and theories Congress finds unacceptable but which by their nature are within the province of the courts to consider. The restriction on speech is even more problematic because in cases where the attorney withdraws from a representation, the client is unlikely to find other counsel."); *Gideon v. Wainwright*, 372 U.S. 335, 344,

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[3] I also do not believe that First Amendment retaliation claims brought by attorneys can be so quickly dismissed on the basis that attorneys are mere conduits for the speech of their clients. While an attorney is expected to present the views of his or her client rather than his or her own personal views during the course of representation, an attorney's act of agreeing to represent a client in the first instance reflects a decision by the attorney to exercise his or her First Amendment rights on behalf of the client. *See Sacher v. United States*, 343 U.S. 1, 9, 96 L. Ed. 717, 72 S. Ct. 451 (1952) ("Of course, it is the right*of counsel* for every litigant to press his claim, even if it appears farfetched and untenable, to obtain the court's considered ruling.") (emphasis added); *Canatella v. California*, 304 F.3d 843, 847, 852-54 (9th Cir. 2002) (viewing attorney's challenge to sanctions imposed for "vexatious litigation, filing of frivolous actions and appeals, and the use of delay tactics" as implicating attorney's First Amendment rights, concluding that attorney had standing because "he and others in his position face a credible threat of discipline under the challenged statutes, and may consequently forego their expressive rights under the First Amendment").

9 L. Ed. 2d 799, 83 S. Ct. 792 (1963) ("In returning to these old precedents, sounder we believe than the new, we but restore constitutional principles established to achieve a fair system of justice. Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth . . . . The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."). However, the ability and willingness of persons to serve as advocates for their clients, particularly in matters adverse to the government, will be severely hampered if persons acting under color of state law are permitted to retaliate with impunity against attorneys who exercise their First Amendment rights on behalf of their clients. *See Velazquez*, 531 U.S. at 548 ("The attempted restriction is designed to insulate the Government's interpretation of the Constitution from judicial challenge. The Constitution does not permit the Government to confine litigants *and their attorneys* in this manner. We must be vigilant when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge.") (emphasis added).

In the end, I simply cannot agree with the majority that the First Amendment plays no role when a public official, acting under the color of state law, allegedly retaliates against an attorney who brings to light potential misconduct by the

public official. *See Gentile*, 501 U.S. at 1034-35 (Kennedy, J.) ("Nevada seeks to punish the dissemination of information relating to alleged governmental misconduct, which only last Term we described as speech which has traditionally been recognized as lying at the core of the First Amendment. . . . It would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted . . . . Public awareness and criticism have even greater importance where, as here, . . . the criticism questions the judgment of an elected public prosecutor. Our system grants prosecutors vast discretion at all stages of the criminal process. The public has an interest in its responsible exercise.") (internal quotation marks and citations omitted); *Barrett v. Harrington*, 130 F.3d 246, 262-63 (6th Cir. 1997) ("Barrett argues that his criticism of Judge Harrington, and his exposure of her wrongdoing is protected by the First Amendment. He is clearly on sound constitutional ground here . . . . Freedom to criticize public officials and expose their wrongdoing is at the core of First Amendment values, even if the conduct is motivated by personal pique or resentment."), *cert. denied*, 523 U.S. 1075, 140 L. Ed. 2d 670 (1998); *United States v. Cooper*, 872 F.2d 1, 5 (1st Cir. 1989) ("We do not endorse the notion that an attorney can do or say anything and everything imaginable within the course of client representation under the guise of vigorous representation of his client. However, the fair administration of justice provides a valuable right to challenge in good faith the neutrality of a judge who appears to be biased against a party. Lawyers using professional care, circumspection and discretion in exercising that right need not be apprehensive of chastizement or penalties for having the advocative courage to raise such a sensitive issue to assure the client's right to a fair trial and the integrity of our system for administering justice."). Far from seeing the courtroom as a place where the First Amendment would "intrude," Maj. Op. at 4, I view the

courtroom as a place where freedom of expression should be embraced and exercised with vigor.

Thus, although I agree that Plaintiff-Appellant Marc D. Mezibov has failed adequately to allege that Defendant-Appellee Mike Allen's retaliatory conduct was so severe as to deter a criminal defense attorney of ordinary firmness from continuing to file motions on behalf of his or her client, *Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) (en banc), I respectfully dissent from the majority's alternative holding that Mezibov's conduct enjoyed no constitutional protection.

APPENDIX C

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 03-3973

[Filed June 16, 2005]

MARC D. MEZIBOV Plaintiff-Appellant,	)
v.	)
MICHAEL K. ALLEN, et al., Defendants-Appellees.	)

JUDGMENT

On Appeal From the United States
District Court for the Southern District
of Ohio at Cincinnati

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court dismissing appellant Marc D. Mezibov's claim under 42 U.S.C. § 1983 is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ _____
Leonard Green, Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF OHIO, WESTERN DIVISION

Case No. C-1-02-559

[Filed June 27, 2003]

MARC D. MEZIBOV	)
Plaintiff,	)
	)
v.	)
	)
MICHAEL K. ALLEN, et al.,	)
Defendants.	)
	)

ORDER

Plaintiff initiated this action in July of 2002 after remarks in October of 2001 regarding the Plaintiff were made to the media by Michael K. Allen, who was and is Hamilton County Prosecuting Attorney during all relevant times. Pursuant to 42 U.S.C. § 1983, Plaintiff asserts claims that the Defendants violated his constitutional rights by retaliating against him for protected speech and conduct. He also asserts supplemental claims of defamation *per se* and defamation *per quod* under Ohio law. Plaintiff names as Defendants Michael K. Allen in his individual and official capacities, and Hamilton County,

Ohio. This matter is now before the Court upon motion by the Defendants for dismissal of the § 1983 claim pursuant to FRCP 12(b)(6) (Doc.3).

I. Background

Plaintiff Marc D. Mezibov is an attorney from Cincinnati licensed to practice law in Ohio and New Jersey and is a partner in the law firm of Sirkin, Pinales, Mezibov & Schwartz. The complaint alleges that on February 27, 2001 the Plaintiff filed three motions in the well-publicized case *State of Ohio v. Jonathan Tobias,* in which the Plaintiff's client, Dr. Tobias, was charged with several crimes involving abuse of corpses in the county morgue. *See* Complaint ¶¶ 8-10. The motions sought to dismiss a grand jury indictment and to disqualify Defendant Allen on the grounds that Mr. Allen had engaged in improper conduct. *See id.* ¶ 10. Although the pleadings do not reveal the ultimate resolution of the motions, on October 1, 2001 Dr. Tobias was convicted by a jury on two of the twenty-six original counts. *Id.* ¶ 11.

The Plaintiff further alleges that, following the trial, the Defendant released a statement to the local media that "[o]bviously, this is a man [Mr. Mezibov] who doesn't try too many cases and the verdict shows that. If I were Dr. Tobias I would ask for my money back" and "Real criminal defense attorneys, lawyers who try cases every day, don't do that, they don't throw mud. . . Obviously it backfired in their face." *Id.* ¶ 12.[1] On October 21, 2001, Mr. Allen also

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[1] If, however, Mr. Allen was right that Dr. Tobias got mulcted during his trial, then he apparently got his money's worth on appeal. Still represented by Mr. Mezibov, the Ohio Court of Appeals recently reversed Dr. Tobias's two convictions. See State v. Tobias, No. C-020261, 2003 WL 21034555 (Ohio Ct. App. May

appeared on a local television talk show and commented extensively on Plaintiff's representation of Dr. Tobias. Among Mr. Allen's statements were the following excerpts:

> because of [Mr. Mezibov's] conduct, [Dr. Tobias] faces two years in prison and the loss of his medical license. You know, in consumer law, we have a saying let the buyer beware. I think in law you ought to have a saying, let the client beware. . . It makes you wonder about the tactics of defense counsel and their intentions, quite frankly.
>
> * * * * * * *
>
> And when my ethics are questioned and when I'm called unethical you're gonna get it back and you're gonna get it back with both barrels because I have to. I can't permit that to happen. Real defense lawyers . . . they try cases on the facts of the case.
>
> * * * * * * *
>
> I have to say had this matter been handled in the normal fashion by a defense lawyer who was interested in his client's best interest rather than having a political show trial, Dr. Tobias very well could have faired a lot better than he did.

Id. ¶ 15.

9, 2003).

On July 29, 2002, Plaintiff filed a complaint under 42 U.S.C. § 1983 alleging that these statements were defamatory and made in retaliation for exercising his First Amendment right to engage in "the constitutionally protected activity [of] filing motions and raising legitimate defenses." *See* Complaint ¶ 16. Plaintiff further alleges that Defendant Allen made the statements with the intent to "chill the vindication of statutory and/or constitutional rights by Plaintiff and other criminal defense attorneys on behalf of criminal defendants" and to prevent Plaintiff "and other criminal defense attorneys from undertaking such vigorous defenses in future cases." *Id.* ¶¶ 1-2.

Defendants do not deny that Mr. Allen made the statements, but claim the excerpts quoted by the Plaintiff are taken out of context in an effort to "veil the circumstances of Allen's statements." *See* Motion at 2. The Defendants contend that Plaintiff has failed to state a claim under § 1983 or Ohio defamation law and filed a motion to dismiss under FRCP 12(b) (6) on September 26, 2002. *Id.*

In their memorandum in support of the Motion to Dismiss, Defendants argue that the First Amendment retaliation claim fails because a criminal defense attorney of ordinary firmness would not be deterred from vigorously defending a client as a result of such statements and that the Plaintiff lacks standing to sue on behalf of other criminal defense attorneys because he has not alleged that his own speech rights have been chilled. *See* Memo. pp. 9-12. Additionally, the Defendants assert that Mr. Allen is entitled to qualified immunity from the § 1983 claim because any alleged violation of a constitutional right was not clearly established and because Mr. Allen did not act unreasonably in light of his own First Amendment rights. *See* Memo. pp. 17-18. The Plaintiff opposes the Motion on all grounds.

II. Standard of Review

A motion to dismiss pursuant to Rule 12(b) (6) operates to test the sufficiency of the complaint. In its consideration of a motion to dismiss under Rule 12(b) (6), the court is required to construe the complaint in the light most favorable to the Plaintiff and to accept all well-plead factual allegations in the complaint as true. *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974); *Roth Steel Products v. Sharon Steel Corp.,* 705 F.2d 135, 155 (6th Cir. 1983). While conclusions of law or unwarranted inferences are not sufficient factual allegations, *Blackburn v. Fisk Univ.* 443 F.2d 121, 124 (6th Cir. 1972), this Court recognizes that "a complaint should not be dismissed for failure to state a claim unless it appears beyond a reasonable doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957).

III. Analysis

In support of the Motion to Dismiss (Doc. 3), Defendants argue that Plaintiff has failed to state a claim for relief because he did not identify a right, privilege, or immunity protected by the Constitution. Defendants also argue Plaintiff's First Amendment claim fails since he cannot prove he was engaged in a constitutionally protected activity or that Defendants' alleged adverse actions caused him to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in such activity.

The basis of a retaliation claim is that "the plaintiff engaged in conduct protected by the Constitution or by statute, the defendant took an adverse action against the plaintiff, and this adverse action was taken (at least in part) because of the protected conduct." *Thaddeus-X v. Blatter,* 175

F.3d 378, 386-87 (6th Cir. 1999). The test for retaliation set forth by the Sixth Circuit requires Plaintiff to prove (1) that he engaged in protected conduct; (2) the action taken against him would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) a causal connection existed between the protected conduct and the adverse action. *Id.* at 394.

In arguing that he was engaged in protected conduct, Plaintiff claims that Mr. Allen's statements have hindered his ability to practice law in the future. Even so, Plaintiff has not alleged any facts that show he was deprived of any right, privilege, or immunity protected by the Fourteenth Amendment. The right to practice law is not a privilege or immunity protected by the Fourteenth Amendment. *See In re Griffiths,* 413 U.S. 717, 719 n.4 (1973); *Bradwell v. Illinois,* 83 U.S. 130, 138-39 (1872); *Saier v. State Bar of Michigan* 293 F.2d 756, 759 (6th Cir. 1961) (quoting *In ex parte Lockwood,* 154 U.S. 116, 117 (1894) ("The right to practice law in the state courts [is] not a privilege or immunity of a citizen of the United States. . .")). Furthermore, the Supreme Court held that even a "brief interruption as a result of legal process [did not] rise to the level of a violation of the Fourteenth Amendment's liberty right to choose and follow one's calling." *Conn v. Gabbert,* 526 U.S. 286, 292 (1999) (holding attorney's Fourteenth Amendment right to practice his profession without unreasonable government interference was not violated when prosecutors executed a search warrant on him while his client was testifying before a grand jury). Since, the right to practice law is not an activity protected by the Fourteenth Amendment, it follows that Defendant's alleged harmful statements caused no constitutionally cognizable injury to Plaintiff.

Plaintiff claims that he was retaliated against because he engaged in the protected rights of filing motions and vigorously defending his client in court. Despite the labels placed on them by Plaintiff, these actions are simply discrete functions of the practice of law. An attorney of necessity engages in a wide range of activities and duties in practicing law. However, as the general practice of law is not a protected right, privilege, or immunity under the Fourteenth Amendment, these specific activities that fall under such classification cannot be considered protected conduct either.

Plaintiff also claims that he was engaged in activity protected by the First Amendment, "vigorously speaking for and on behalf of his client in the course of his legal representation in a criminal matter." Memo. in Opp. p. 10 (Doc. 10). As alleged, Plaintiff has failed to plead any facts that show he was deprived of any First Amendment right. Speaking for or on behalf of a client in the course of legal representation directly flows from the practice of law. As an experienced trial attorney, Plaintiff understands that vigorously defending a client may encompass a variety of activities including filing motions, attending conferences, and appearing in court. The rights alleged here are inseparable from those asserted in Plaintiff's Fourteenth Amendment claim. All of these activities are part and parcel of the practice of law. Thus, Plaintiff has not alleged facts which show a distinct First Amendment violation.

Plaintiff has no standing to assert claims for relief on behalf of other criminal defense attorneys. Generally speaking, a plaintiff must assert his or her own claims and cannot sue on behalf of third parties. *See Powers v. Ohio*, 499 U.S. 400, 410 (1991) (citing *Department of Labor v. Triplett*, 494 U.S. 715, 720 (1990) and *Singleton v. Wulff*, 428 U.S. 106, 114 (1976)). The Supreme Court, however, has

recognized limited exceptions to this rule where the following three criteria are met: "[1] the litigant must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute; [2] the litigant must have a close relation to the third party; and [3] there must exist some hindrance to the third party's ability to protect his or her own interests." *Id.* at 411.

Turning to the first prong of the test, injury-in-fact, Plaintiff did not allege a cognizable injury that he suffered. As noted by the Court, supra, Plaintiff failed to state claims for relief under the First and Fourteenth Amendments. Thus, Plaintiff does not satisfy the first criteria for establishing third party standing. With Plaintiff's failure to meet the first prong of the test for third party standing, the Court need not address the remaining prongs.

Having failed to plead the existence of a protected right, privilege, or immunity under the First and/or Fourteenth Amendments, Plaintiff has failed to plead a claim for relief for retaliation under § 1983. Accordingly, Defendants' Motion to Dismiss is well-taken and is GRANTED. Plaintiff's § 1983 claims are DISMISSED WITH PREJUDICE.

Having found that Plaintiff has failed to plead any constitutional injury, whether Defendant Allen is entitled to qualified immunity from suit is a moot question.

Having dismissed Plaintiff's federal claims, the Court declines to exercise supplemental jurisdiction over exclusively state-law claims pursuant to 28 U.S.C. 1367(c)(3). *See Hankins v. The Gap,* 84 F.3d 797, 802-03 (6th Cir. 1996). Accordingly, Plaintiff's defamation claims are DISMISSED WITHOUT PREJUDICE.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF OHIO, WESTERN DIVISION

Case No. C-1-02-559

[Filed June 27, 2003]

MARC D. MEZIBOV Plaintiff-Appellant,	))
v.	)
MICHAEL K. ALLEN, et al., Defendants-Appellees.	))

JUDGMENT

This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendants' Motion to Dismiss Plaintiff's § 1983 Claims [Doc. 3] is granted and Plaintiff's § 1983 claims are **Dismissed with Prejudice.**

The Court declines to exercise Supplemental Jurisdiction over the remaining state law claims. The state law defamation claims are **Dismissed Without Prejudice** and this case is closed pursuant to Order of the Court [Doc. 8].

June 27, 2003
Date

KENNETH J. MURPHY
Clerk

/s/
(By) Deputy Clerk

(2)

No. 05-945

IN THE

Supreme Court of the United States

MARC D. MEZIBOV,

Petitioner,

v.

MICHAEL K. ALLEN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an attorney's in-court statements and motions on behalf of his client constitute "protected activity" for purposes of the attorney's § 1983 First Amendment retaliation claim against a prosecutor.

2. Whether an attorney asserting a § 1983 First Amendment retaliation claim is required to prove adverse action on the part of the defendant that would deter a person of ordinary firmness from continuing to engage in the protected activity.

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STATEMENT OF JURISDICTION

The Sixth Circuit's decision was entered June 16, 2005. A petition for rehearing with a suggestion for rehearing *en banc* was denied on September 29, 2005. The petition for writ of certiorari was filed on December 28, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case arises from a complaint filed on July 29, 2002 by Petitioner Marc D. Mezibov against Respondents Michael K. Allen and Hamilton County, Ohio. The complaint asserts a claim under 42 U.S.C. § 1983 alleging Allen retaliated against Mezibov in response to Mezibov's exercise of First Amendment rights. Mezibov also asserted a state law defamation claim.

Mezibov is an attorney who represented a defendant in a criminal proceeding in Hamilton County, Ohio. Allen was the prosecutor in that proceeding.

During the criminal case, Mezibov filed on behalf of his client a "Motion to Dismiss Indictment for Presence of Unauthorized Person Before A Grand Jury;" a "Motion to Disqualify Hamilton County Prosecutors' Office Due to Conflict of Interest;" and a "Motion to Dismiss Indictment for Outrageous and Unethical Conduct in the Form of Extrajudicial Statements by the Hamilton County Prosecutor." The motions sought to dismiss the grand jury indictment against Mezibov's client and to disqualify prosecutor Allen on grounds that he engaged in improper conduct.

Mezibov's client was convicted.[1] After the trial, Allen issued a press release containing his opinions on Mezibov's trial tactics and effectiveness in representing his client. Allen later made similar comments on a local television talk show.

Mezibov was never prevented from advancing any argument or theory on behalf of his client. No civil or criminal proceedings or other actions were taken against Mezibov in connection with his motions and in-court statements. The alleged "adverse action" that forms the basis of Mezibov's § 1983 First Amendment retaliation claim is Allen's statements to the media following the criminal trial. Mezibov alleges Allen's statements to the media were defamatory and made in retaliation for Mezibov's in-court statements and motions which he claims were constitutionally protected.

The alleged statements by Allen on which Mezibov bases his retaliation claim are set forth in paragraphs 12 and 15 of the complaint and are reproduced at pages 3-6 of the petition for writ of certiorari. The Sixth Circuit found that the gist of these statements was that Mezibov was an inexperienced attorney who allowed his personal interests to come before those of his client. *Mezibov v. Allen*, 411 F.3d 712, 722-23 (6th Cir. 2005).

The alleged harm suffered by Mezibov as a result of Allen's comments is set forth in paragraph 24 of the complaint which alleges "[a]s a direct and proximate result of Allen's false and defamatory statements and retaliatory conduct . . . Mr. Mezibov has suffered damage to his professional reputation and emotional anguish and distress

1. Mezibov's client's conviction was overturned on appeal.

entitling him to compensation in an amount to be determined by the evidence at trial."

Contrary to Mezibov's suggestion at pp. 2-3 of the petition, the complaint contained no factual allegations indicating Allen's statements were "retaliat[ory]," "false" or "intended" to have a chilling effect on criminal defense attorneys. Rather, Allen's statements to the media concerned his opinions of Mezibov's effectiveness during the trial. Allen's statements were themselves protected by the First Amendment.

The district court dismissed the § 1983 claim under Fed.R.Civ.P. 12(b)(6). The district court left open to Mezibov the option of pursuing his state law defamation claims in state court. The Sixth Circuit affirmed the district court's dismissal on two bases. First, the court held Mezibov's in court speech on behalf of his client was not a constitutionally "protected activity" for purposes of a § 1983 claim for First Amendment retaliation. The court recognized that the courtroom is a nonpublic forum where even viewpoint-discriminatory prior restraints on speech are routinely enforced. *Mezibov* at 718-19. In recognizing that *no one* has a right to *free* expression during the course of a judicial proceeding, the court merely "re-affirm[ed] the commonsense principle that attorneys do not possess 'any right in the first amendment that is not the common legacy of every citizen.'" *Id.* at 719.

The court further held that even if Mezibov's in-court speech was "protected conduct" for purposes of a First Amendment retaliation claim, the claim still failed because he did not allege that he suffered harm sufficient to "deter a person of ordinary firmness from continuing to engage in the allegedly constitutionally protected conduct." *Id.* at 721.

REASONS FOR DENYING THE PETITION

Mezibov exaggerates the scope of the Sixth Circuit's holding by taking it out of context. He frames the issue as whether attorneys are "deprived of all First Amendment protection with regard to the representation of clients." (Petition at p. i). In fact, the court below merely held that an attorney's statements to the court during a judicial proceeding did not fall within the attorney's *personal* First Amendment right to freedom of expression for purposes of the "protected activity" analysis in a First Amendment retaliation claim.

It is true, the idea of limiting an attorney's "free speech" rights while advocating for his client in a courtroom is counterintuitive. As the Sixth Circuit noted below, "[a]t first blush, the courtroom seems like the quintessential arena for public debate . . . ." *Mezibov* at 717. However, as the court proceeded to demonstrate, there is perhaps no other setting in which such severe restrictions on free speech — even content-based prior restraints — have been so routinely applied. Indeed, this Court has recognized in dicta that "it is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1071 (1991).

Mezibov suggests that "no other court in the country has so completely denied attorneys the protection of the First Amendment when representing defendants in criminal court proceedings." One need look no further than *Zal v. Steppe*, 968 F.2d 924 (9th Cir. 1992), *cert. denied*, 506 U.S. 1021, to see the inaccuracy of this statement. In *Zal*, the Ninth Circuit upheld an order *in limine* that banned an attorney from expressing certain ideas while defending his clients in

a criminal trial. In a concurring opinion, Judge Trott explained, "a courtroom is not a public forum in the technical sense that this terminology is used in free-speech analysis." *Zal* at 932 (Trott, J. concurring) (citing *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985) (traditional public fora are "those places which 'by long tradition or by government fiat have been devoted to assembly and debate'")). Although "debate" occurs within courtrooms, they are not venues for "free debate." *Id.*

Mezibov was not subjected to any prior restraint on his speech during the criminal case, nor was he subjected to legal action for his in-court speech, which is protected by the absolute judicial privilege.[2] Rather, Mezibov is attempting to recover money damages through § 1983 because of Allen's post-trial comments to the local media concerning Mezibov's trial tactics. The court below simply held that Mezibov's in-court communications on behalf of his client did not constitute "protected activity," personal to Mezibov, for purposes of his retaliation claim.

With respect to the second basis for the Sixth Circuit's opinion below, it is evident that Mezibov's quarrel is not with the rule of law articulated by the court, but in how the court applied that rule to the particular facts of his case. The court, consistent with the other circuits, recognized Mezibov was required to allege adverse action that would "deter a person of ordinary firmness from continuing to engage in the constitutionally protected conduct." *Mezibov* at 721. In applying the rule to Mezibov, the court concluded Allen's alleged defamatory statements would not

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2. *See, e.g., Briscoe v. LaHue*, 460 U.S. 325, 334-35 (1983) (The common law provides absolute immunity from civil or criminal liability for all persons involved in the judicial process.").

deter a criminal defense attorney of ordinary firmness from continuing to zealously represent his clients. *Id.* at 722. This application of the law is also consistent with the approach used by other circuits.

None of the constitutional claims Mezibov seeks to raise before this Court merit plenary review. The Sixth Circuit's ruling is consistent with this Court's prior holdings and with the other Circuits that have addressed the issues. For these reasons, certiorari should be denied.

I. THE DECISION OF THE COURT BELOW THAT AN ATTORNEY'S IN-COURT STATEMENTS ON BEHALF OF CLIENTS ARE NOT "PROTECTED ACTIVITY" FOR PURPOSES OF THE ATTORNEY'S FIRST AMENDMENT RETALIATION CLAIM IS CORRECT AND DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT OR OTHER CIRCUIT COURTS

It has been uniformly recognized that the courtroom is a non-public forum where the First Amendment rights of all persons are strictly limited. In *Zal v. Steppe*, 968 F.2d 924 (9th Cir. 1992), *cert. denied*, 506 U.S. 1021, attorney Zal represented anti-abortion activists charged with criminal trespass for blocking access to a clinic. The trial judge granted the prosecution's motion in limine to exclude any mention of 50 specific words and phrases such as "fetus," "abortion," "rights of the unborn," and "any reference to God or deity." These restrictions clearly had the effect of limiting the legal theories the defendants could present to the jury. During the trial, Zal asked witnesses several questions using the banned words and was held in criminal contempt. After unsuccessful appeals, he filed a petition for writ of habeas corpus claiming

the *in limine* order violated his First Amendment rights. The Ninth Circuit held the pre-trial ban on the mention of certain ideas during the trial was constitutionally sound. In so holding, the court recognized that every litigant has a right to press his claim and obtain the court's considered ruling. However, the court added that:

> *[I]f the ruling is adverse, it is not counsel's right to resist it or to insult the judge — his right is only respectfully to preserve his point for appeal.* During a trial, lawyers must speak, each in his own time and within his allowed time, and with relevance and moderation. These are such obvious matters that we should not remind the bar of them were it not for the misconceptions manifest in this case.

Zal at 928 (emphasis in original) (quoting *Sacher v. United States*, 343 U.S. 1, 8-9 (1952) (Approving summary contempt citation and punishment for attorney's in-court statements and conduct)); *see also Berner v. Delahanty*, 129 F.3d 20, 26 (1st Cir. 1997).

As the court below pointed out,

> "[a]n attorney's speech in court and in motion papers has always been tightly cabined by various procedural and evidentiary rules, along with the heavy hand of judicial discretion. In fact, judges regularly fine attorneys, and even throw them in jail from time to time, as a direct consequence of attorneys' in-court speech, and it appears no circuit court has ever found this to violate the First Amendment."